

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:00CR3092-1
)	
Plaintiff,)	
)	MEMORANDUM
vs.)	AND ORDER
)	
MIGUEL RODRIGUEZ,)	
)	
Defendant.)	

Defendant, relying upon United States v. Booker, 543 U.S. 220 (2005), has filed a pro se “motion to eliminate enhancements and reduce sentence” (filing 90), which the court construes as a motion filed under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence of a person in federal custody (“§ 2255 motion”). Under this construction, Defendant later will be subject to the statutory restrictions on filing “second or successive” § 2255 motions.

However, because Defendant has not specifically characterized his filing as a § 2255 motion, the court will allow Defendant a reasonable opportunity either to withdraw the motion from the court’s consideration or to amend it so that it contains all the § 2255 claims that Defendant believes he has. See Castro v. United States, 540 U.S. 375 (2003). If Defendant elects to amend the § 2255 motion, he should use the standard form that is available from the clerk of the court.

If Defendant does not withdraw or amend the pending § 2255 motion, it will be denied as time-barred. Although Defendant alleges that his motion could be filed within one year following Supreme Court’s decision in Booker (i.e., until January 12, 2006), this is incorrect. Booker does not apply retroactively to cases on collateral review. See Never Misses A Shot v. United States, 413 F.3d 781 (8th Cir. 2005).

IT IS ORDERED that:

1. The clerk of the court shall docket filing 90 as a § 2255 motion.
2. Within thirty (30) days of today's date, Defendant shall file either (a) a notice stating that he desires to withdraw filing 90 from the court's consideration or (b) an amended § 2255 motion, using the standard form available from the clerk of the court, that will supersede filing 90.
3. If Defendant fails to comply with the above directive, the court will deny filing 90 as time-barred under 28 U.S.C. § 2255.

December 15, 2005.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge